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No. 01-1126

# In the Supreme Court of the United States

J.B. MAYFIELD, *et al.*,
*Appellants*,
v.
STATE OF TEXAS, *et al.*,
*Appellees*.

**On Appeal from the United States District Court for the Eastern District of Texas, Tyler Division**

## MOTION TO AFFIRM

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## QUESTIONS PRESENTED

1. Is a state legislative redistricting plan with an overall population deviation of less than 10%—the level this Court has recognized as *de minimis*—subject to challenge simply because the legislative decision was partially influenced by partisan considerations?

2. Did the three-judge panel correctly reject Appellants' population-based challenges given that the Legislative Redistricting Board's Texas Senate Plan has a *de minimis* overall population deviation?

## LIST OF PARTIES

Appellants list both Henry Cuellar, in his capacity as Texas Secretary of State, and Geoffrey S. Connor, in his capacity as Acting Texas Secretary of State, as parties to the action below. Neither are parties to this appeal, however, as the current Texas Secretary of State is Gwyn Shea.

Former Texas Secretary of State Cuellar was originally named in his official capacity as a defendant below, but he resigned from office in late 2001. Geoffrey S. Connor then served as Acting Secretary of State, and he automatically substituted for Secretary Cuellar in the proceeding below. FED. R. CIV. P. 25(d)(1). For this appeal, however, the current Secretary of State, Gwyn Shea, is automatically substituted in her official capacity. SUP. CT. R. 35.3.

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## MOTION TO AFFIRM

Pursuant to Supreme Court Rule 18.6, the State of Texas, Texas Governor Rick Perry, and Texas Secretary of State Gwyn Shea (collectively "the State") move to affirm the judgment rendered by the three-judge panel on the ground that the question presented is so insubstantial as not to require further argument. SUP. CT. R. 18.6.

### STATEMENT OF THE CASE

The State objects to the argumentative tone and conclusory statements in Appellants' statement of the case. Instead of relying on Appellants' statement of the case, the State directs the Court to the statement of proceedings set out in the three-judge court's opinion, which is a fair recitation of the proceedings leading up to this appeal. J.S., App. at 1-4.[1]

1. Appellants' Jurisdictional Statement will be cited as "J.S."

## ARGUMENT

### I. THE QUESTIONS PRESENTED ARE NOT SUBSTANTIAL AND THE COURT SHOULD SUMMARILY AFFIRM.

#### A. Appellants' Population-Based Challenges Against the LRB Senate Plan Fail Because the Plan's Overall Population Deviation Is Less Than 10%.

It is undisputed that the overall population deviation of the Legislative Redistricting Board (LRB) Senate Plan is 9.71%. J.S. at 8. Appellants argue that the LRB offered no justification for this overall deviation when a zero-percent deviation was possible. But as the three-judge court correctly held, this challenge is easily defeated by the Court's jurisprudence.

Population deviations amounting to less than 10% are *de minimis* and establish a *prima facie* presumption of validity. *See, e.g., Brown v. Thompson*, 462 U.S. 835, 842 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977). As the Court explained in *Brown*,

> "'minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.' Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations." 462 U.S., at 842 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 745 (1973), and citing *Connor*, 431 U.S., at 418; *White v. Regester*, 412 U.S. 755, 764 (1973)).

Because the Senate Plan has an overall population deviation of less than 10%, the plan is *prima facie* lawful and the deviation requires no further justification. *See id.*; *see also Gaffney*, 412 U.S., at 745.

Appellants argue that no rational state policy or neutral redistricting criteria excuses the 9.71% deviation, but their complaint is misplaced. If the population deviation falls below the 10% threshold, the plan is entitled to a presumption of validity and "the districting body will not be required to justify minor deviations." *Chen v. City of Houston*, 206 F.3d 502, 522 (CA5 2000), *cert. denied*, 121 S.Ct. 2020 (2001) (citing *Gaffney*, 412 U.S., at 749-54).

Appellants erroneously allege that the presumption should have been rebutted because the Senate Plan has the "taint of arbitrariness or discrimination." *See Roman v. Sincock*, 377 U.S. 695, 710 (1964)). But Appellants' primary support for this allegation is the mere assertion that smaller population discrepancies were achievable. This is insufficient to establish the kind of arbitrary, invidious discrimination required to rebut the presumption of validity that attaches when a plan's overall deviation is less than 10%. *See Gaffney*, 412 U.S., at 740-41 (stating that if deviations are *de minimis*, the "additional fact that another plan could be conceived with lower deviations among the State's legislative districts" does not rebut the presumption of lawfulness); *see also Daly v. Hunt*, 93 F.3d 1212, 1221 (CA4 1996). This Court's jurisprudence, therefore, precludes Appellants' argument.

**B. The Legislative Body's Consideration of Partisan Factors Does Not Render the Plan Arbitrary or Invidiously Discriminatory.**

Appellants also attempt to rebut the plan's presumptive lawfulness by arguing that population deviations are the result of partisan line-drawing, as evidenced by at least one "bizarre" district. This claim fails in light of the Court's decision in *Gaffney*, which rejected a virtually identical challenge to a Connecticut state plan. 412 U.S., at 751-53 & n.18.

First, the Court recognized that "partisan line-drawing" was an inevitable consequence of legislative districting efforts:

> "We are quite unconvinced that the reapportionment plan offered by the three-member Board violated the Fourteenth Amendment because it attempted to reflect the relative strength of the parties in locating and defining election districts. It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary. Politics and political considerations are inseparable from districting and apportionment. The political profile of a State, its party registration, and voting records are available precinct by precinct, ward by ward." *Id.*, at 752 (citations omitted).

Similarly, the Court rejected the argument that "bizarrely" shaped districts were the result of political line-drawing, noting that "compactness or attractiveness has never been held to constitute an independent federal constitutional requirement for state legislative districts." *Id.*, at 752 n.18 (citing *White v. Weiser*, 412 U.S. 783 (1973); *Wright v. Rockefeller*, 376 U.S. 52, 54 (1964)); *cf. Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("[W]here unconstitutional vote dilution is alleged in the form of statewide political gerrymandering, the mere lack of proportional representation will not be sufficient to prove unconstitutional discrimination.").

The impact of politics on district lines is an inevitable consequence of redistricting:

> "It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely. Redistricting may

> pit incumbents against one another or make very difficult the election of the most experienced legislator. The reality is that districting inevitably has and is intended to have substantial political consequences." *Gaffney*, 412 U.S., at 752-53.

Similarly, Appellants' other complaints about districts being under- or over-populated must fail because all implicate deviations well below the 10% threshold. J.S. at 11-12. Such *de minimis* deviations, even if influenced in part by partisan considerations, are constitutionally immaterial absent specific evidence establishing that "the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole." *Davis*, 478 U.S., at 132. Appellants have not, and cannot, substantiate such a claim. And their general objection that partisan politics invaded the districting process does not state a viable constitutional challenge. *See Gaffney*, 412 U.S., at 751-53.

The Court should decline Appellants' invitation to equate the mere existence of political considerations in the districting process with arbitrariness or invidious discrimination. Such an approach would plunge the Court into the "political thicket," compelling the type of judicial second-guessing of state legislatures that the Court has steadfastly rejected. *Id.*, at 749-50.

In *Gaffney* and *Davis*, the Court recognized that political considerations by a legislative body are an inevitable part of the districting process, and the Court appropriately rejected partisan-based constitutional challenges in both of these cases. Here, too, the Court should reject Appellants' partisan-based claims and affirm the judgment of the three-judge court.

### C. There Is No Support for Appellants' Theory That the LRB Focused on the 10% *De Minimis* Standard Rather Than Population Equality.

The Court should reject Appellants' unsupported allegation that the LRB's goal was to satisfy the 10% *de minimis* standard rather than achieve population equality. Simply because the State defended the plan on the ground that it fell within a *de minimis* deviation of less than a 10% does not mean the LRB cast aside population-equality concerns in favor of this 10% "target"; and, it certainly does not invalidate the presumptive lawfulness of the plan.

In essence, Appellants ask the Court to disregard the Senate Plan's presumptively lawful, less-than-10% deviation and to infer, instead, that the lack of *perfect* population equality signals invidious political motives. That approach flips the Court's jurisprudence on its head and defeats the very purpose of the *de minimis* threshold: to preserve legislative responsibility for redistricting and to avoid courts' becoming "bogged down in a vast, intractable apportionment slough, particularly when there is little, if anything, to be accomplished by doing so." *Gaffney*, 412 U.S., at 749-51. There is no support for Appellants' unprecedented inversion of this Court's well-established principles.

Appellants misplace reliance on the Fourth Circuit's decision in *Daly v. Hunt* and the Southern District of Illinois's unpublished decision in *Hulme v. Madison County*—neither of which support Appellants' argument.[2] Contrary to Appellants' assertion, these cases do not establish that a state plan is "tainted by arbitrariness or

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2. The unpublished decision in *Hulme v. Madison County*, No. 01-CV-0456-DRH (S.D. Ill. Nov. 28, 2001), cannot be found on Westlaw and is apparently available only as a slip opinion on the Southern District of Illinois website, at http://www.ilsd.uscourts.gov/opinions2.cfm?JID=3.

discrimination" if partisan line-drawing occurs. J.S. at 15-16. Rather, they confirm that a *de minimis* deviation can be challenged only through independent proof of invidious discrimination or another constitutional or Voting Rights Act violation (*i.e.*, something other than the population deviation itself).[3] *Daly*, 93 F.3d, at 1220-21; *Hulme*, slip op. at 7 (quoting *Daly*, 93 F.3d, at 1220) (requiring independent evidence that the "apportionment process had a taint of arbitrariness or discrimination."). No such independent evidence exists with respect to the LRB Senate Plan, and that plan's presumptive validity remains intact.

Fundamentally, Appellants seek to mire the Court in case-specific, evidentiary issues that are inappropriate for this Court's review. The LRB produced a Senate Plan that was precleared by the Department of Justice and upheld by the three-judge court based on this Court's well-established precedent. Appellants had ample opportunity to present evidence of invidious discrimination at trial, yet they failed to do so—presumably because no such evidence exists. The Senate Plan is constitutional, and the three-judge court correctly rejected Appellants' challenges to that plan.

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3. In *Daly*, the Fourth Circuit remanded the case to the district court to determine whether the requisite, independent evidence of invidious discrimination existed. 93 F.3d, at 1222. In *Hulme*, the district court determined that independent evidence of coercion and other bad acts during the districting process established a prima facie case of discrimination. *Hulme*, slip op. at 12-15.

## CONCLUSION

The Court should summarily affirm the judgment of the three-judge court. SUP. CT. R. 18.12.

Respectfully submitted,

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